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**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF ARIZONA**

United States of America,  
  
Plaintiff,  
  
vs.  
  
David Allen Harbour,  
  
Defendant.

Case No. 2:19-cr-00898-DLR (DMF)

**MEMORANDUM ON THE  
SUBJECT OF RESTITUTION**

(Hearing April 9, 2024)

The Mandatory Victims Restitution Act 18 U.S.C.S. §3663A ("MVRA"), provides redress to the victims of fraud, but it does not supply a windfall for those who independently enter into risky financial enterprises through no fault of the fraudsters. If a person gives the Defendant his money to bet, knowing that the bet might lose, his later loss, for purposes of restitution, is, in this fundamental sense, caused not by the defendant accepting his money, but by the outcome of the bet. *U.S. v Calderon*, 944 F.3d 72 (2nd Cir. 2019).

The "bet" here was the "bargain" which was defined by the Court in Doc 800, that is, how Harbour would use the Burg, Turasky, Hill's and Cathey money. The evidence

1 proves beyond any doubt that Harbour used the money or placed the "bet" per the  
2 representations that were made.

3 Harbour never had a bargain or "bet" with PAIF. PAIF's bet was with Green  
4 Circle, as was Oak Tree's. Burgess's company, Microbilt, he claimed, could underwrite  
5 the consumer loans to a probability of a 20% (or less) rate of default. Harbour had  
6 nothing to do with PAIF, its business plan, or its bargain with Green Circle. However,  
7 Microbilt scored all the Green Circle consumer loans; those made with PAIF money and  
8 those made with Oak Tree money.  
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11 Per the testimony of Burgess, PAIF made a good bet, because if Microbilt  
12 approved the loans, they would pay. In addition, Burgess told the Court that Green Circle  
13 *always* paid and the PAIF Weekly Settlement Reports we provided the Court proved that  
14 Green Circle generated over \$11 million in Gross Income and paid PAIF over \$5 million.  
15 The Court ignored all of this once. We hope it will not do so again. None of which was  
16 considered by the Court. Harbour did not make the consumer loans, Green Circle did.  
17 Harbour did not underwrite the consumer loans, Burgess did, through Microbilt.  
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20 PAIF claims that it lost \$3.2 million on the loans Green Circle made using  
21 Harbour supplied money. Assuming the Court buys this absurd and unsupported  
22 contention, how does that possibly become Harbour's fault? We know all the money Oak  
23 Tree, including substituted dollars for the \$695,000 of Burg and Turasky money initially  
24 deployed to repay advances Harbour had made to and for the benefit of Oak Tree,  
25 reached Green Circle. We know that Alonzo Primus, PAIF's CEO and Chief Credit  
26 Officer was Green Circle's Treasurer and Controller. And, yet, for sentencing purposes,  
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1 this Court erroneously attributed the unsubstantiated loss claims to Harbour and, we  
2 imagine, may well do the same for restitution.

3       The reason that PAIF “succeeded” to the interests Oak Tree had in the consumer  
4 loans made by Green Circle to consumers was because PAIF was the senior lender to  
5 PAIF. When Green Circle allegedly breached the loan covenants, PAIF’s senior position  
6 allowed PAIF to gain whatever *benefit* there might have been to the Green Circle  
7 portfolio. Harbour had no guarantees out to PAIF. Harbour did not owe PAIF anything.  
8 Harbour lent to Green Circle; PAIF lent to Green Circle. PAIF only “lost” money on the  
9 Oak Tree funded loans because it failed to gain the benefit of the Oak Tree funded loans.  
10 Even if one buys the farcical and perjurious Burgess premise, since Harbour and Oak  
11 Tree had not guaranteed anything to PAIF, the fact that PAIF did not benefit did not  
12 mean that PAIF *lost* any of the money *PAIF* had loaned to Green Circle.  
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16       On his part, Cathey testified he met directly with Joel Tucker and decided to loan  
17 the money for payday lending after meeting with Joel. Carol Hill testified she was writing  
18 all these checks to lenders, and she wanted to make the high interest rate. She said her  
19 and her husband Pat decided to loan the money. Hill deposited her money into DNA and  
20 Hill wired her money out of DNA to KSQ. There was no confusion that Hill understood  
21 the "bet" or the "bargain."  
22

23       Meanwhile, Burg and Turasky lawyers set the parameters of the "bet" and Harbour  
24 used their money per the parameters set by the lawyers. The documents written by Burg  
25 and Turasky lawyers did not guarantee the bet and explained they could lose the "bet."  
26 The only way this could be fault of Harbour, is if the money was not used per the terms  
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1 of the agreements. Turasky agreed in his declaration Harbour used the money per the  
2 terms. Burg and Dean Avedon testimony and relevant agreements made it clear Harbour  
3 could use Burg's money for an investment (Green Circle) and to reimburse expenses that  
4 had been incurred (2014 Schedules C and E). Burg entered into the agreements  
5 independently on the advice of his lawyers and financial advisor.  
6

7 We have already noted, at length, the mistakes made by the Court in failing to  
8 proceed under Rule 32 and failing to address loss causation for sentencing. It is important  
9 to note that, as badly as we believe the Court erred in sentencing, loss causation for  
10 restitution is not permitted for loss caused by "relevant conduct even though such conduct  
11 may be properly included in offense level calculation" under the sentencing guidelines.  
12 Restitution is only for those who have been "direct harmed by the defendants criminal  
13 conduct" *U.S. v Vilar*, 729 F.3d 62 (2nd Cir. 2013) citing *U.S. v Lussier*, 104 F.3d 32, 33  
14 (2nd Cir. 1997).  
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17 The amount of restitution that may be ordered is limited "by the victim's actual  
18 loss." *U.S. v Bussell*, 504 F.3d 956, 964 (9th Cir. 2007) This is not the gross amount,  
19 which the Court mistakenly used for sentencing. In *Lonich*, the 9th Cir. vacated the  
20 sentence and therefore the restitution, because the government did not prove that Lonich  
21 caused the losses. *U.S. v Lonich*, 23 4th 881 (9th Cir. 2021)  
22

23 The 9th Cir. ruled; "An unrelated, intervening cause of a loss defeats a claim for  
24 restitution." *U.S. v Meksian*, 170 F.3d 1260 1263 (9th Cir. 1999) This applies to Cathey,  
25 Hill's, Burg, Turasky and PAIF. While the government mocked and derided Operation  
26 Choke Point, the most charitable thing that can be said is that the government did so out  
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1 of ignorance. Cathy and the Hills lost their money solely because of the illegality of  
2 Operation Choke Point.

3 To qualify as a victim under the MVRA, the government must show an actual and  
4 proximate cause between the harm suffered and a defendant's conduct underlying the  
5 offense conviction. "But for" causation is insufficient and although multiple links in the  
6 causal chain may exist, the chain may not extend so far as to become unreasonable. The  
7 government bears the burden of proving by a preponderance of the evidence both the  
8 amount of the victim's loss and that a "non-attenuated" causal connection exists between  
9 that loss and the defendant's conduct. *U.S. v Swor*, 728 F.3d 971, 974 (9th Cir. 2013); *see*  
10 *also, U.S. v Peterson*, 538 F.3d 1064 (9th Cir. 2008)

13 The 9th Cir. has found that specific findings of fact are necessary at times and the  
14 district court must set forth an explanation of its reasoning, supported by the record, when  
15 a dispute arises as to the proper amount of restitution. *U.S. v Hai Waknine*, 543, F.3d 546  
16 (9th Cir. 2008) Just as he vociferously disputed loss causation and related conduct for  
17 sentencing, so too does Harbour dispute *any* restitution, therefore the Court is required to  
18 explain its reasoning if it grants *any* restitution (except for Count 24, which, as the Court  
19 has already ruled, will be whatever the Tax Court determines is the tax for 2012, once it  
20 is finally decided).

23 The Supreme Court has explained that proximate cause is often explained as  
24 foreseeability, that is, whether the former event caused the latter and Restitution orders  
25 should represent an application of the law, not a decision makers caprice. *Paroline v U.S.*,  
26 572 U.S. 434, 444 (2014). In summary, Restitution and Sentencing both require loss  
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1 causation, except the rules for loss causation are even more stringent for restitution than  
2 for sentencing. The government did not provide any evidence of loss causation for  
3 sentencing, and they have not provided it for Restitution.

4  
5 Harbour's conviction, per Doc 800, is the law of the case. He was convicted  
6 because he only sent a portion of Turasky and Burg's money to Green Circle while using  
7 a portion of it to reimburse expenses that, the Court found -erroneously - that Harbour  
8 had not incurred.

9  
10 Although the IRS refuted this ruling by allowing more than \$695,000 of expenses  
11 on his 2014 Schedules C and E and that Harbour had Gross Income more than \$695,000  
12 in 2014, none of this is material or connected to the Hill's, Cathey or PAIF.

13  
14 The evidence from the trial record and posttrial record proved that Harbour sent  
15 100% of Cathey and Hill's money to the investment, KSQ. None of it was diverted to  
16 reimburse expenses that Harbour had incurred or to pay for personal expenses. Why the  
17 Court found that their losses should count as relevant conduct is a complete mystery,  
18 given that it is incontrovertible that Operation Choke Point caused their losses. That  
19 Cathey's losses were counted for sentencing, and might be counted again here, is  
20 inexplicable. No one else was charged or even described as a co-conspirator for whose  
21 conduct Harbour was responsible and Cathey never met or even spoke to Harbour until  
22 after Operation Choke Point had ruined his investment.

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25 Meanwhile, to reach the sentence it meted out, the Court already reversed its  
26 denial of victim status to PAIF without any attempt to comply with Rule 32, F.R.Crim.P.

1 The bald assertion that PAIF lost \$3.2 million that should be attributed to Harbour was a  
2 fraud perpetrated on this Court that it swallowed whole.

3       The \$1.1 million PAIF advanced to Green Circle was at the request of Green  
4 Circle, not Harbour, to pay back the money Green Circle had borrowed from Harbour /  
5 Oak Tree. The trial record proved the \$1.1 million was used to pay a lender of Oak Tree,  
6 which is exactly what Burgess testified was his belief the money was being advanced for.  
7 The posttrial record supported the testimony of Cameron that the \$1.1 million paid back  
8 KC Lending who in fact loaned Green Circle through Harbour / Oak Tree \$1.1 million.  
9 The posttrial record provided the Court with a signed Declaration from Dunsworth that  
10 supported the testimony of Cameron that she reviewed a declaration from Dunsworth.  
11

12       This Declaration supported the testimony of Burgess that Green Circle used the  
13 \$1.1 million to pay back a lender, which was Dunsworth, and the Green Circle bank  
14 statements proved he did loan \$1.1 million. The Declaration also supported that  
15 Dunsworth then loaned the \$1.1 million to Harbour as a personal loan, which again  
16 supported the testimony of Cameron.  
17

18       To this day, the Court has not explained how Harbour defrauded PAIF or how  
19 Harbour caused PAIF to lose any money. The Court has chosen to dismiss the testimony  
20 of Cameron and Purifoy and the declaration of Dunsworth. The Court has also decided to  
21 dismiss the testimony of Burgess that his company Microbilt approved the consumer  
22 loans for Green Circle and that Burgess told the Court if Microbilt approved the loans,  
23 they were good loans.  
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1       The Court also decided without any explanation to dismiss the testimony of  
2 Burgess that he did not know if Harbour changed the consumer loans in the LMS and he  
3 did not know who put the July 2015 aging report together that Harbour sent to Primus.  
4 Burgess's testimony was in alignment with the testimony Purifoy, that Harbour could not  
5 change any consumers in the LMS. Again, the Court has not provided any support either  
6 factually from the trial record or case law how it determined to include PAIF in  
7 sentencing and how Harbour could of caused their losses, if in fact, they actually had any  
8 losses. The same can be said for Cathey and the Hill's.  
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11       The Court refused to provide any critical fact finding or legal conclusions on how  
12 Harbour caused their loss. To this point, the Court has never stated what the fraud is that  
13 Harbour committed against Cathey, Hills and PAIF. This is in complete disregard of the  
14 requirements set by the Supreme Court and the 9th Circuit. Both require the Court to  
15 explain its reasoning supported by the trial record.<sup>1</sup> Respectfully, we strongly believe that  
16 the unforced errors made in the sentencing procedure by this Court when it failed and  
17 refused to follow the mandate of the 9<sup>th</sup> Circuit, will result in, at least, a remand for re-  
18 sentencing. The Court will, unless it reverses course, face the same likelihood of reversal  
19 based on restitution.  
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24       <sup>1</sup> "To facilitate meaningful appellate review, the court must also provide a reasoned  
25 explanation for its sentencing decision." U.S. v Ameline 409 F.3d 1073 1986 (9th Cir.  
26 2005) Under Ameline the 9th Cir. vacated the sentence "because the district court  
27 unfairly shifted the burden of proof to the defendant forcing the defendant to prove a  
28 negative and to bear the risk of his failure of proof." The 9th Cir. ordered the court to  
have a new sentencing hearing in accordance with F.R.C.P. 32(i).



1 With respect to the restitution for Harbour's 2012 tax amount, it is in tax court and  
2 waiting for a ruling on Harbour carrying back his 2014 losses to 2012, which will  
3 eliminate the tax owed for 2012. Since the tax restitution is secondary to the victim  
4 restitution, it is not relevant to these proceedings. Once Harbour and IRS come to a  
5 decision or the tax court rules, the amount will be the restitution per the plea agreement.  
6

7 There are 3 steps the Government and the Court were required to go through in  
8 order to enhance the sentence and of course satisfy the requirements of Restitution.  
9

10 First Step; the Court must determine what misrepresentation was fraudulent for the  
11 offense of conviction, because everything flows from this misrepresentation. What  
12 evidence and case law did the court rely on that supports the misrepresentation was  
13 fraudulent, that Harbour schemed to defraud, contemplated harm or injury and lied about  
14 the bargain.  
15

16 Second Step; the Court must determine how that fraudulent misrepresentation to  
17 Burg, Turasky, Cathey, Hill's and PAIF caused their loss. The only ruling by the court  
18 with respect to the offense of conviction was Harbour misrepresenting how he would use  
19 Burg and Turasky money.  
20

21 Third Step; If the trial and posttrial records show any intervening causes that may  
22 have caused the loss, the causal chain is broken. Here, there were intervening causes, and  
23 internal and external factors as well as economic forces all of which were unforeseeable  
24 and out of Harbour's control. The Court was required to consider them for sentencing.  
25 The Court is also required to consider them for restitution.  
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1 If the requirement is that the fraud be the proximate cause of the loss for the loss to  
2 be the subject of mandatory restitution under the MVRA, then the amount of mandatory  
3 restitution in this case is zero. Turasky is not seeking restitution. Burg is, though not for  
4 himself, but for the Hills. He invested \$1 million. Of that, Harbour used \$400,000 for  
5 reimbursement of expenses he had advanced to Oak Tree and then replaced, so that Green  
6 Circle got Burg's \$1 million. Where did the \$1 million wind up? Ask Burgess. PAIF got  
7 it or it was lost because Green Circle made bad loans; neither of which had anything to do  
8 with Harbour.  
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10  
11 PAIF itself neither borrowed money from Harbour nor invested any money with  
12 Harbour. Harbour borrowed no money from PAIF nor invested any money in PAIF. The  
13 sole relationship between Harbour and PAIF was that PAIF was a senior lender to Green  
14 Circle and, if PAIF lost any money at all based upon the loans Green Circle made, there  
15 can be no reason to look to Harbour for Green Circle having done so.  
16

17 Cathey never met Harbour nor spoke to him until after the collapse of Pay Day  
18 lending proximately related to Operation Choke Point. The Hills \$581,000 went down  
19 alongside Cathey's money, and it is nothing short of outrageous that the same  
20 government that caused a shift of from \$4 - \$6 billion in wealth from the pay day lenders  
21 to the pay day borrowers by threatening the banks decided, here, to pin the losses caused  
22 by Operation Choke Point onto Harbour.  
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24  
25 There are no losses for purposes of restitution attributable to Harbour. The  
26 restitution analysis is of particular importance because, whereas forfeiture cannot extend  
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1 to Abby Harbour's own jewelry that was seized for forfeiture, restitution does extend to  
2 community property.

3 RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of April 2024.

4  
5 CHRISTIAN DICHTER & SLUGA, P.C.

6  
7 By: /s/ Stephen M. Dichter

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10  
11 **CERTIFICATE OF SERVICE**

12 I hereby certify that on April 4, 2024, I electronically transmitted the attached  
13 document to the Clerk's Office using the CM/ECF system for filing and for transmittal  
14 of Notice of Electronic Filing to the following CM/ECF registrants:

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21 /s/ Yvonne Canez